IN THE
SUPREME COURT OF THE UNITED STATES

NO. 1410078

Supreme Court, U.S.
FILED
JUN 0 1 2015
OFFICE OF THE CLERK

COMMONWEALTH OF MASSACHUSETTS,
Respondent

V

JAIME CAETANO,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner in the above-entitled case moves pursuant to Rule 39 of the rules of this Court that she be permitted to proceed in forma pauperis. The petitioner has previously been granted leave to proceed in forma pauperis by the Massachusetts District Court and the Massachusetts Supreme Judicial Court. Undersigned counsel was assigned below to represent the petitioner pursuant to Mass. Gen. Laws c.211D, §5, and Rule 3:10 of the rules of the Supreme Judicial Court.

JAIME CAETANO

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Dated: June 1, 2015.

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QUESTIONS PRESENTED

A "stun gun" is a non-lethal electronic weapon invented in 1972 for individual self-defense in case of confrontation. Massachusetts is among those states that have made it a crime for a private citizen to possess a stun gun under any circumstances. The petitioner was convicted of violating Massachusetts' statute after being found in possession of an operable stun gun, which — it was undisputed below — she carried for purposes of self-defense in case of further confrontation with her abusive former partner. On appeal, the Supreme Judicial Court of Massachusetts affirmed the petitioner's conviction, rejecting on the merits her claims (1) that a stun gun is an "arm" protected by the Second Amendment, and (2) that Massachusetts' outlawing of stun guns violates the petitioner's Second Amendment rights under *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). The questions presented are:

1. Is a stun gun an "arm" within the meaning of the Second Amendment?

2. Does Massachusetts' blanket prohibition on the possession of stun guns infringe the right of the people to keep and bear arms in violation of the Second and Fourteenth Amendments?

LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts affirming the petitioner's conviction appears at Appendix A and is reported at 470 Mass. 774, 26 N.E.3d 688 (2015).

The unpublished decision of the Massachusetts District Court denying the petitioner's pretrial motion to dismiss appears at Appendix C.

JURISDICTION

The date of the opinion and judgment of the Supreme Judicial Court of Massachusetts sought to be reviewed is March 2, 2015. This petition is filed on June 1, 2015, which is 90 days after the date of the Supreme Judicial Court's opinion, as computed and extended according to Rule 30.1 The Supreme Judicial Court of Massachusetts is the highest court of Massachusetts. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> . No State shall . . deprive any person of life, liberty, or property, without due process of law.

Chapter 140, §131J, of the Massachusetts General Laws provides:

> No person shall possess a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill . . .
>
> * * * *
>
> Whoever violates this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2 1/2 years, or by both such fine and imprisonment. A law enforcement officer may arrest without a warrant any person whom he has probable cause to believe has violated this section.

STATEMENT OF THE CASE

At about 3 p.m. on September 29, 2011, police officers responded to a call about a possible shoplifting at a supermarket in Ashland, Massachusetts. The supermarket manager pointed out the petitioner, who was seated in a motor vehicle in the parking lot outside the store, and told the officers that she may have been involved. The police approached the vehicle. Following a conversation with the officers, the petitioner consented to a search of her purse. Inside her purse, the petitioner had an operational stun gun. The petitioner told the police that the stun gun was for self-defense against her violent and abusive former partner. She was arrested for possession of a stun gun in violation of Mass. Gen. Laws ch. 140, §131J.

The petitioner challenged the constitutionality of §131J in a pretrial motion to dismiss. Relying on *District of Columbia* v. *Heller*,

554 U.S. 570 (2008), and *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), the petitioner asserted that a stun gun is an "arm" within the meaning of the Second Amendment, that it is primarily a weapon for individual self-defense and is currently in common use in the United States for that purpose, and that the petitioner kept and carried her stun gun for lawful self-defense in case of confrontation with her abuser. As such, she argued that her possession of the stun gun was protected by the Second and Fourteenth Amendments. The motion was denied. Appendix C.

At a jury-waived trial, the parties stipulated that the petitioner's stun gun was the sort of "portable [electronic] device or weapon" the possession of which is criminalized by §131J.[1/] The petitioner testified that the stun gun was for self-defense against her abuser, whom she had previously sought to keep at bay with restraining orders.[2/] The petitioner further testified that she had displayed the stun gun to fend off her abuser when confronted by him outside her place of

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[1/]Tasers deliver an electric shock through two wire-tethered "barbs," which can be propelled up to fifteen feet to penetrate the clothing or skin of the target. A stun gun (the kind of device borne by the petitioner) delivers its charge when it is held in direct contact with the target. Tasers and stun guns are both portable, hand-held devices. Both deliver a powerful electric shock that immediately incapacitates the target by causing uncontrollable muscle contractions, and are designed not to kill or injure. See *People* v. *Yanna*, 297 Mich. App. 137, 140 n.3, 824 N.W.2d 241, 243 n.3 (Mich. Ct. App. 2012); National Institute of Justice, Police Use of Force, Tasers and Other Less-Lethal Weapons, at 2 (May 2011) (NIJ Report) (http://www.ncjrs.gov/pdffiles1/nij/232215.pdf) (last visited May 27, 2015); Eugene Volokh, Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life, 62 Stan. L. Rev. 199, 204-209 (2009); Paul H. Robinson, A Right to Bear Firearms but Not to Use Them? Defensive Force Rules and the Increasing Effectiveness of Non-lethal Weapons, 89 B.U.L. Rev. 251, 254-257 (2009).

[2/]Documentary proof of these restraining orders was submitted with the petitioner's motion to dismiss and admitted in evidence at trial.

employment, at a time when she was homeless and living in a "hotel."[3/]

The judge found the petitioner guilty of possession of a stun gun and placed the conviction "on file," i.e., without imposition of sentence. The petitioner initially consented to this disposition but later withdrew her consent and moved for sentencing to preserve her right of appeal under Massachusetts law. The judge again placed the conviction on file, over the petitioner's objection. The petitioner appealed. Following allowance of the petitioner's application for direct appellate review, the Supreme Judicial Court of Massachusetts (SJC) issued an opinion affirming her conviction. Appendix A.

As an initial matter, the SJC squarely rejected the Commonwealth's contention that the Court was without jurisdiction to hear the petitioner's appeal. *Commonwealth* v. *Caetano*, 470 Mass. 774, 776-777, 26 N.E.3d 688, 690 (2015). That contention rested on the state-law proposition that a conviction placed "on file" ordinarily "is not a judgment from which an appeal may be taken." *Id.*, citing *Commonwealth* v. *Delgado*, 367 Mass. 432, 438, 326 N.E.2d. 716, 719 (1975) (no appeal prior to judgment, "which in criminal cases is the

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[3/]The petitioner testified that she had sought to end the relationship after her abuser (with whom she had two children) put her "in the hospital," that, "in fear for [her] life," she accepted the stun gun from an acquaintance whom she met while homeless, and that her abuser thereafter "showed up at [her] job again" and "was waiting for [her] outside when [she] got out of work."

> "[H]e started screaming — like he usually did — . 'You're not gonna F'n work at this place' and 'You should be home with the kids. . ' I said, 'I'm not gonna take this anymore. Somebody . gave me this and I don't wanna have to do it to you, but if you don't leave me alone, I'm gonna have to.' And . he ended up leaving. He, I guess, got scared and left me alone."

The prosecutor did not cross-examine the petitioner, and, indeed, urged the trial judge to credit her testimony. Transcript of Massachusetts District Court bench trial, July 10, 2013, at 31, 35-36, 38, 40.

sentence"). Here, however, it was clear "that the [petitioner] wanted to pursue an appeal on the constitutionality of the criminal statute of which she was adjudged guilty, and that she withdrew her consent and moved for sentencing for that purpose." 470 Mass. at 777, 26 N.E.3d at 690. Because Massachusetts law recognizes that a criminal defendant has a right to appeal a conviction placed on file "without her consent," the SJC held that the conviction in the petitioner's case was properly before it for appellate review. *Ibid.*

On the merits, the SJC held that Massachusetts' blanket prohibition on stun guns "does not violate the Second Amendment right articulated in *Heller*," and "affirmed the [petitioner's] conviction of possession of an electrical weapon in violation of [Mass. Gen. Laws ch. 140, §131J]." 470 Mass. at 783, 26 N.E.3d at 695. In reaching this result, the SJC "acknowledge[d] that stun guns may have value for purposes of self-defense," 470 Mass. at 783, 26 N.E.3d at 695, but concluded that, *"[w]ithout further guidance from the Supreme Court on the scope of the Second Amendment,* [it would] not extend the Second Amendment right articulated by *Heller* to cover stun guns." *Id.* at 779, 26 N.E.3d at 692 (emphasis supplied).[4]

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[4] Art. 17 of the Massachusetts Declaration of Rights, which is Massachusetts' cognate constitutional provision to the Second Amendment, "previously has been held to encompass a collective, and not an individual, right to bear arms," *Commonwealth* v. *Caetano*, 470 Mass. at 778 n.4, 26 N.E.3d at 691 n.4, citing *Commonwealth* v. *Davis*, 369 Mass. 886, 888, 343 N.E.2d 847, 848-849 (1976), for which reason the petitioner's appeal to the SJC claimed a violation of her federal constitutional rights only.

REASONS FOR GRANTING THE PETITION

I.

STUN GUNS AND TASERS ARE NON-LETHAL, PORTABLE ELECTRONIC WEAPONS DESIGNED AND COMMONLY USED BY LAW ENFORCEMENT, THE MILITARY, AND LAW-ABIDING CITIZENS FOR SELF-DEFENSE IN CASE OF CONFRONTATION. *HELLER* STATES THAT THE SECOND AMENDMENT EXTENDS, "PRIMA FACIE," TO ALL SUCH "BEARABLE ARMS," EVEN IF THEY "DID NOT EXIST AT THE TIME OF THE FOUNDING." THE PETITION SHOULD BE GRANTED BECAUSE THE SJC'S OPINION CONFLICTS WITH *HELLER* ON THIS THRESHOLD CONSTITUTIONAL QUESTION, AND ALSO WITH THE TWO OTHER APPELLATE COURT DECISIONS TO HAVE CONSIDERED WHETHER STATE-LAW BANS OF WEAPONS LESS LETHAL THAN HANDGUNS SURVIVE *HELLER*.

The SJC's refusal — absent "further guidance from" this Court — to "extend the Second Amendment right articulated by [*District of Columbia* v.] *Heller* [, 554 U.S. 570 (2008),] to cover stun guns," *Commonwealth* v. *Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688, 692 (2015), is bottomed on its conclusion that a stun gun is not "the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment." *Id.* at 777, 26 N.E.3d at 691. See also *id.* at 781, 26 N.E.3d at 693 ("[T]here can be no doubt that a stun gun was not in common use at the time of [the Second Amendment's] enactment. "; the "invention of this weapon [in 1972] clearly postdates the period relevant to our analysis").

This conception of the Second Amendment — as a sort of fossilized relic trapped in amber — permeates the SJC's opinion in this case, and is fundamentally at odds with what *Heller* teaches with respect to the threshold question whether the Second Amendment extends, prima facie, to a given instrument. In a critical passage, which the SJC does not reference, *Heller* states that what the Founders

meant by "Arms" is "no different from the meaning today." *Heller*, 554 U.S. at 581:

> Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary; see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).
>
> The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. . Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. *We do not interpret constitutional rights that way.* Just as the First Amendment protects modern forms of communications, e.g., *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo* v. *United States*, 533 U.S. 27, 35-36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding.*

Heller, 554 U.S. at 581-582 (emphases supplied).

Heller could not be clearer on the point that "Arms" — as that word appears in the Second Amendment — includes, prima facie, bearable weapons that came into existence after 1789. And, just like the modern "handgun" at issue in *Heller*, a stun gun is an instrument designed to be borne "for . defence, or to cast at or strike another." *Heller*, 554 U.S. at 581. See n.1, *ante* at 3 The SJC, however, validates the criminalizing of an entire class of "Arms" falling squarely within the plain language used by the Framers without even

acknowledging this Court's constitutional definition of what "instruments . constitute bearable arms" for purposes of Second Amendment analysis.

Untethered to *Heller*'s definitional mooring, the SJC reaches a result — that the "thoroughly modern" stun gun cannot be counted as an "arm" within the meaning of the Second Amendment, see 470 Mass. at 781, 26 N.E.3d at 694 — which conflicts directly with the only other reported case to have considered this precise question. See *People* v. *Yanna*, 297 Mich. App. 137, 140, 824 N.W.2d 241, 243 (Mich. Ct. App. 2012) (striking down Michigan statute criminalizing possession of portable electronic weapons: following *Heller*, the Second Amendment "protect[s] a citizen's right to possess and carry Tasers or stun guns for self-defense, and the state may not completely prohibit their use by private citizens").[5/] The SJC's opinion in this case also cannot be reconciled with *State* v. *DeCiccio*, 315 Conn. 79, 105 A.3d 165 (Conn. 2014), where, in an exceptionally thorough and thoughtful opinion, see *id.* at 108-150, 105 A.3d at 185-210, the Supreme Court of Connecticut recently read *Heller* to invalidate a Connecticut statute criminalizing the transport of dirk knives and police batons in a motor vehicle.[6/]

Stun guns obviously "were not in common use at the time of the Second Amendment's enactment," 470 Mass. at 781, 26 N.E.3d at 693, because they did not even exist until 1972. *Id.* The SJC finds this fact

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[5/]The SJC's opinion does not cite *Yanna*.

[6/]*DiCiccio* was decided three weeks after oral argument in the petitioner's case, and was brought to the SJC's attention by her post-argument letter (submitted pursuant to Rule 16(l) of the Massachusetts rules of appellate procedure). Appendix B. The SJC's opinion does not cite *DiCiccio*.

dispositive. But this Court "do[es] not interpret constitutional rights that way." *Heller*, 554 U.S. at 582. The petition should be granted because this case is the perfect vehicle for the Court to address the merits of how and why the Second Amendment applies, prima facie, to bearable arms that did not exist at the time of the founding.

II.

THE PETITION SHOULD BE GRANTED SO THE COURT CAN MAKE CLEAR THAT THE "CORE" OF THE SECOND AMENDMENT IS THE INDIVIDUAL RIGHT TO KEEP AND CARRY A BEARABLE INSTRUMENT — SUCH AS A STUN GUN — FOR SELF-DEFENSE IN CASE OF CONFRONTATION, AND THAT THIS RIGHT MAY EXIST OUTSIDE THE HOME.

Although stun guns did not exist in 1789, other portable self-defense weapons much less lethal than firearms, such as knives and billy clubs, were in common use at the time of the founding. See *State* v. *DeCiccio*, 315 Conn. at 117-118, 105 A.3d at 190-191.[7] And, like the modern handgun at issue in *Heller*, a stun gun may be kept in a location (such as a purse) "that is readily accessible in an emergency," and that may be utilized by "those without the upper-body strength to lift and aim" a heavier weapon. *Heller*, 554 U.S. at 629. Stun guns thus share many of the features — albeit virtually none of the lethality

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[7] "[B]ecause settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term 'arms,' as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. . Thus, the term 'arms' 'includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon. . The appropriate inquiry is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era "

State v. *DeCiccio*, 315 Conn. at 117-118, 105 A.3d at 191, quoting *State* v. *Delgado*, 298 Ore. 395, 399, 692 P.2d 610, 612 (Or. 1984).

— that make handguns so popular as weapons of self-defense.

The SJC avoids all this by finding, for one reason or another, that the "conduct" underlying the petitioner's conviction falls outside "the 'core' of the Second Amendment.'" 470 Mass at 778, 26 N.E.3d at 691, quoting from *Hightower* v. *Boston*, 693 F.3d 61, 72 (1st Cir. 2012). In this respect, the SJC joins other post-*Heller* appellate decisions that have struggled to discern whether the "core" of the Second Amendment protects against anything other than the narrowest set of operative facts which can be gleaned from *Heller* itself, e.g, "legislation that works a complete ban on the possession of operable handguns in the home by law-abiding, responsible citizens for use in immediate self-defense." *Powell* v. *Tompkins*, 783 F.3d 332, ___, 2015 U.S. App. LEXIS 6149, *31 (1st Cir. 2015).

Here, the SJC says the petitioner's conviction falls outside the "core" of the Second Amendment:

(1) because stun guns would be deemed "dangerous per se" at common law, and therefore may be banned conformably with *Heller* pursuant to "the historical tradition of prohibiting carrying of 'dangerous and unusual' weapons," *id*. at 778-779, 26 N.E.3d at 691-692 (quoting *Heller*, 554 U.S. at 627),[8/]

[8/]The SJC does not explain why a stun gun — a weapon designed *not* to kill or maim and is "almost never fatal," Volokh, *supra*, Nonlethal Self-Defense, 62 Stan. L. Rev. 204 — could be banned in accord with *Heller* as an "instrumentality designed and constructed to produce death or great bodily harm," 470 Mass. at 779, 26 N.E.3d at 692 (citations omitted), while handguns, which "cause well over 60,000 deaths and injuries in the United States each year," *McDonald* v. *City of Chicago*, 561 U.S. at 924 (Breyer, J., dissenting), are the "quintessential self-defense weapon" for Second Amendment purposes. *Heller*, 554 U.S. at 629. See also NIJ Report, *supra* at 2 ("A study by Wake Forest University researchers found that 99.7 percent of people who were shocked by [conducted energy devices such as stun guns and Tasers] suffered no injuries or minor injuries only"); *State* v. *DeCiccio*, 315 Conn. at 121, 105 A.3d at 193 ("As to whether dirk knives are 'dangerous and unusual weapons,' . . . and, therefore,

(FOOTNOTE CONTINUED ON NEXT PAGE)

(2) because stun guns were not "in common use" in 1789, 770 Mass. at 779, 26 N.E.3d at 692,[9]

(4) because the "number of Tasers and stun guns is dwarfed by the number of firearms" currently in circulation, *id.* at 781, 26 N.E.3d at 694 (quoting petitioner's pretrial motion to dismiss),[10]

(5) because "there is nothing in the record to suggest that [stun guns] . are readily adaptable to use in the military," *id.* at 781, 26 N.E.3d at 694,[11] and, finally,

(6) because, the petitioner, when she was arrested, was not "using the stun gun to defend herself in her home. . . ." *Id.* at 779, 26 N.E.3d at 692.

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[9](FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
not 'arms' within the meaning of the [S]econd [A]mendment, their more limited lethality relative to other weapons that, under *Heller*, fall squarely within the protection of the [S]econd [A]mendment — e.g., handguns — provides strong support for the conclusion that dirk knives also are entitled to protected status").

[9]See Argument I, *ante*, at 6-9. Moreover, like his knife or his club, the 18th-century militiaman might well have brought his stun gun to the muster (if he had one to bring), as evidenced by their rapidly increasing popularity among "law enforcement and military agencies." NIJ Report, *supra*, at 1. See also n. 7, *ante*, at 9. Cf. *Caetano*, 470 Mass. at 780 n.5, 26 N.E.3d at 693 n.5 (suggesting that a weapon cannot count as an "arm" unless it was in common use in 1789 for self-defense in the home *and* "typically used by militiamen") (citing *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 (1980)).

[10]The Second Amendment is not a popularity contest. In any event, Tasers and stun guns are legal in most states, see *People* v. *Yanna*, 297 Mich. App. at 144, 824 N.W.2d at 245, and "[h]undreds of thousands of [them] have been sold to private citizens, with many more in use by law enforcement officers." *Id.* See also Volokh, *supra*, Nonlethal Self-Defense, 62 Stan. L. Rev. at 200, 244 (listing Massachusetts as one of seven states that outlaw the possession of stun guns by law-abiding citizens). As to the number or prevalence of stun guns in Massachusetts, a state should not be permitted to make a self-defense weapon relatively scarce by declaring it to be contraband and then use that state-created scarcity to label the instrument "unusual" for purposes of Second Amendment analysis.

[11]The SJC did not notice the NIJ Report, supra, at 1 ("More than 15,000 law enforcement and military agencies use" Tasers and other portable electric self defense weapons). See also Executive Office of Public Safety and Security, Annual Electronic Weapons Use Analysis: A Summary of Electronic Weapons Use in Massachusetts, at Appendix A (July 2010) (listing sixty-one Massachusetts law enforcement agencies authorized to use conducted energy devices) (available at http://www.mass.gov/eopss/docs/chsb/firearms/ew-quarterly-report-data-analysis.pdf) (last visited May 29, 2014).

In the petitioner's view, the SJC's analysis of the first five factors, *supra*, which it says remove stun guns from the "core" of the Second Amendment is confused by its failure to address as a threshold matter whether stun guns are "instruments that constitute bearable arms," notwithstanding the fact that they "were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. As to the sixth factor, however, the SJC is quite correct that *Heller* interprets the Second Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller*, 554 U.S. at 635, "'*where the need for defense of self, family, and property is most acute.*'" 470 Mass. at 778, 26 N.E.3d at 691 (quoting *Heller*, 554 U.S. at 628) (emphasis added by the SJC). The SJC also correctly observes that the petitioner was not "using her stun gun to defend herself in her home" at the moment she was arrested for violating Massachusetts' prohibition on the possession of stun guns by otherwise law-abiding citizens.

This, however, is precisely where the SJC's reading of *Heller* goes most seriously awry. The petitioner was a homeless victim of domestic violence. When restraining orders did not work, she carried a stun gun — a non-lethal instrument designed for individual self-defense, and typically possessed by law-abiding citizens in states other than Massachusetts for that purpose. She had displayed the stun gun to successfully fend off her abuser when he confronted her outside her job. The SJC's approach would render all of these undisputed facts irrelevant for Second Amendment purposes on the rationale that the petitioner happened to be arrested in the parking lot of a supermarket

rather than in a "home" she did not have.

The Second Amendment "guarantee[s] the individual right to possess and carry weapons *in case of confrontation*." *Heller*, 554 U.S. at 592 (emphasis added). "Individual self-defense is 'the *central component*' of the Second Amendment" itself. *McDonald*, 561 U.S. at 767, quoting *Heller*, 554 U.S. at 599 (emphasis in *Heller*). Although the "need" for self-defense may be "most acute" inside the home, *Heller*, 554 U.S. at 628, it cannot be that the right itself simply evaporates at the threshold. Confrontations are not limited to the home. Judge Posner illustrated the point in terms that apply, almost word for word, to this case:

> A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to [bear arms] in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.

Moore v. *Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).[12]

This case presents the question whether the Second and Fourteenth Amendments permit a state to outlaw the mere possession of a stun gun, not whether stun gun ownership may be reasonably regulated. Because the statute in question "prohibit[s] a class of weapons entirely," 470 Mass. at 779, 26 N.E.3d at 692, the approach

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[12] In *Moore* v. *Madigan*, the Seventh Circuit held that an Illinois statute which came "close to" banning the public carrying of loaded handguns was unconstitutional, because *Heller*'s reading of the Second Amendment cannot logically be restricted to the home, and because there was no "more than merely a rational basis" for believing that such a ban would increase public safety. 702 F.3d at 939-942.

taken by the SJC would afford the petitioner no Second Amendment protection even if she had been arrested for possessing a stun gun while in the act of fending off her abuser inside whatever place she called "home." For this reason, the statute in question cannot survive anything more than "rational-basis scrutiny," *Heller*, 554 U.S. at 628 n.27, and the SJC's proffered reasons why legislators might reasonably decide to ban stun guns, 470 Mass. at 781-782, 26 N.E.3d at 694, are entirely beside the point.

* * *

In a parting shot, the SJC says its affirmance of the petitioner's conviction will not "affect[] [her] right to bear arms" because, "[b]arring any cause for disqualification," she "could have applied for a licence to carry a firearm," or carried mace or pepper spray instead. 470 Mass. at 783, 26 N.E.3d at 695 (citing Mass. Gen. Laws c.140, §§122D and 129B). Cold comfort. The statutes cited deem the petitioner to now be a "prohibited person" who is disqualified as a result of the conviction affirmed below from ever obtaining a firearm license, or from purchasing or possessing self-defense spray.[13] The petition should be granted because, by reaching a result that violates the petitioner's Second Amendment right to bear arms in case of confrontation, the SJC renders its own suggested state-law self-defense alternatives infeasible.

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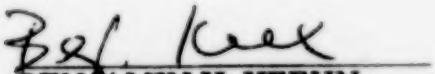
[13] Section 129B prohibits the issuance of a firearm license to any person who "has ever . been convicted . of, a felony ; a misdemeanor punishable by imprisonment for more than 2 years [, or] . ; a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed." Section 122D states that "[n]o person shall purchase or possess self-defense spray who has been convicted" of the same types of crimes identified in section 129B.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: June 1, 2015.

APPENDIX A

Commonwealth v. Caetano

Supreme Judicial Court of Massachusetts

December 2, 2014, Argued; March 2, 2015, Decided

SJC-11718

Reporter
470 Mass. 774; 26 N.E.3d 688; 2015 Mass. LEXIS 103

COMMONWEALTH *vs.* JAIME CAETANO.

PRIOR HISTORY: [***1] Middlesex.. COMPLAINT received and sworn to in the Framingham Division of the District Court Department on September 30, 2011.

A motion to dismiss was heard by *Robert V. Greco*, J.; the case was heard by *Martine G. Carroll*, J., and a motion for sentencing was considered by her.

The Supreme Judicial Court granted an application for direct appellate review.

Counsel: *Benjamin H. Keehn*, Committee for Public Counsel Services, for the defendant.

Michael A. Kaneb, Assistant District Attorney, for the Commonwealth.

Keith G. Langer, for Commonwealth Second Amendment, amicus curiae, submitted a brief.

[*775] *Eugene Volokh*, of California, *Michael E. Rosman & Michelle A. Scott*, of the District of Columbia, *& Lisa J. Steele*, for Arming Women Against Rape & Endangerment, amicus curiae, submitted a brief.

Judges: Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & HINES, JJ.

OPINION BY: SPINA

Opinion

[**689] SPINA, J. The defendant, Jaime Caetano, asks us to interpret the holdings of the United States Supreme Court in *McDonald* v. *Chicago*, 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), and *District of Columbia* v. *Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), to afford her a right under the Second Amendment to the United States Constitution to possess a stun gun in public for the [***2] purpose of self-defense. The defendant was arrested for possession of a stun gun in a supermarket parking lot, claiming it was necessary to protect herself against an abusive former boy friend. She now challenges the constitutionality of G. L. c. 140, § 131J, which bans entirely the possession of an electrical weapon with some exceptions not applicable here. We hold that

a stun gun is not the type of weapon that is eligible for Second Amendment protection, see *Heller, supra* at 622, and we affirm the defendant's conviction.[1]

1. *Background.* At approximately 3 P.M. on September 29, 2011, Ashland police officers responded to a call about a possible shoplifting at a supermarket. The manager of the supermarket had detained someone in the store, and he informed police that the defendant and a man with whom she left the store also may have been involved. The manager pointed to a man standing next to a motor vehicle in the parking lot outside the supermarket. The defendant was seated in the vehicle. Officers approached it. Following a conversation [***3] with officers, the defendant consented to a search of her purse. Inside the purse, the defendant had an operational stun gun.[2] The defendant told police that the stun gun was for self-defense against a former boy friend. Police charged her with possession of a stun gun in violation of G. L. c. 140, § 131J.[3]

[**690] The defendant challenged the constitutionality of § 131J in a [*776] pretrial motion to dismiss. She argued that the stun gun is an "arm" for purposes of the Second Amendment, that it is a weapon primarily for self-defense and in common use in the United States for that purpose, and that she kept her stun gun for purposes of self-defense. As such, she argued that her possession of the stun gun was protected by the Second Amendment. The motion was denied.

At a jury-waived trial, the parties stipulated that the device in question was a stun gun regulated by G. L. c. 140, § 131J. The defendant testified that the stun gun was for self-defense against a former boy friend. She further testified that her former boy friend was violent, and that previously she had displayed the stun gun during a confrontation with him. She said that she had been homeless and living in a hotel. The judge found the defendant guilty of possession of the stun gun and placed the case on file. The defendant consented to having the case placed on file. Approximately two and one-half months later the defendant filed a written [***5] objection to the case being placed on file, and she moved for sentencing.

A hearing was held on the motion. The Commonwealth recommended the imposition of the minimum fine. The defendant proposed a fine less than the minimum. Both the Commonwealth and the judge recognized that the purpose of the hearing was to preserve the defendant's right of appeal. After discussion, the judge again placed the case on file over the defendant's objection in the belief that this action would preserve the defendant's right of appeal.

The defendant filed a timely notice of appeal. We granted her application for direct appellate review.

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[1] We acknowledge the amicus briefs submitted by Commonwealth Second Amendment and Arming Women Against Rape & Endangerment in support of the defendant.

[2] The stun gun was a black electronic device with two metal prongs and a switch. Once the switch was thrown, an electrical current appeared between the prongs. Stun guns are designed to stun a person with an electrical current after the prongs are placed in direct contact with the person and the switch is thrown.

[3] General Laws c. 140, § 131J, forbids the private possession of a "portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill" except by specified public officers or suppliers of such devices, if possession is "necessary to the supply or sale of the device or weapon" to agencies utilizing it. Violation of this section is punishable "by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less [***4] than [six] months nor more than [two and one-half] years, or by both such fine and imprisonment." *Id.*

2. *Appellate jurisdiction*. As an initial matter, the Commonwealth argues that this appeal is not properly before the court. The basis of this argument is that no judgment resulted from the defendant's conviction because a conviction placed on file is not a judgment from which an appeal may be taken. Generally, a judgment in a criminal case is the sentence, and a defendant has no right of appeal until after the sentence is imposed. See *Com-* [*777] *monwealth* v. *Ford*, 424 Mass. 709, 713 n.2, 677 N.E.2d 1149 (1997) (conviction placed on filed suspends defendant's right to appeal alleged error in proceeding); [***6] *Commonwealth* v. *Delgado*, 367 Mass. 432, 438, 326 N.E.2d 716 (1975) (no appeal until after judgment "which in criminal cases is the sentence"). See also Mass. R. Crim. P. 28 (e), 453 Mass. 1501 (2009) (court may file case after guilty verdict without imposing sentence).

We have recognized that a defendant has a right to appeal a conviction on file without her consent. *Delgado, supra*. It was clear to all involved that the defendant wanted to pursue an appeal on the constitutionality of the criminal statute of which she was adjudged guilty, and that she withdrew her consent and moved for sentencing for that purpose. We conclude that the defendant may proceed with her appeal. See *id*.

3. *Discussion*. Where we must determine whether the Massachusetts ban on [**691] stun guns violates the Second Amendment, we are bound by decisions of the United States Supreme Court on the matter. The Supreme Court recently interpreted the Second Amendment in a historical context that focused on the meaning of various words and phrases in the amendment as they probably were understood and used by Congress at the time of the Second Amendment's enactment. In accord with that analysis we must determine whether a stun gun is the type of [***7] weapon contemplated by Congress in 1789 as being protected by the Second Amendment.

In *Heller*, 554 U.S. at 635, the United States Supreme Court held that "[a] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." The Court in *Heller* was confronted with a total ban on handgun possession in the home, and a further requirement that any lawful firearm kept in the home be rendered inoperable. *Id*. at 628. The Court reasoned that

> "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute*. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home [*778] 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' ... would fail constitutional muster." (Footnote omitted; emphasis [***8] added.)

Id. at 628-629, quoting *Parker* v. *District of Columbia*, 478 F.3d 370, 400, 375 U.S. App. D.C. 140 (D.C. Cir. 2007). The Supreme Court extended this interpretation of the Second Amendment to the States in *McDonald*, 561 U.S. at 791. The defendant now urges that the outright prohibition on the private possession of stun guns in Massachusetts violates the right articulated in *Heller*.[4]

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[4] At issue here is only the applicability of the Second Amendment to the statute. The cognate Massachusetts constitutional provision, art. 17 of the Massachusetts Declaration of Rights, previously has been held to encompass a collective, and not an individual, right to bear arms. See *Commonwealth* v. *Davis*, 369 Mass. 886, 888, 343 N.E.2d 847 (1976). The *Heller* Court, before reaching its conclusion,

"Since *Heller*, '[c]ourts have consistently recognized that *Heller* established that the possession of operative [***9] firearms for use in defense of the home constitutes the 'core' of the Second Amendment.'" *Commonwealth* v. *McGowan*, 464 Mass. 232, 235, 982 N.E.2d 495 (2013), quoting *Hightower* v. *Boston*, 693 F.3d 61, 72 (1st Cir. 2012). Moreover, the Supreme Court said in *Heller* that the Second Amendment individual right to keep and bear arms is "not unlimited." 554 U.S. at 595. The Court identified certain examples of lawful prohibitions and limitations on the Second Amendment right including, but not limited to, "prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626. In addition to the lawfulness of prohibitions against possession of arms by certain persons, the Court recognized the existence of

> [**692] "another important limitation on the right to keep and carry arms. [*United States* v.] *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' ... We think that limitation is fairly supported by the historical tradition of prohibiting carrying of 'dangerous and unusual weapons.'"

Heller, supra at 627, quoting *United States* v. *Miller*, 307 U.S. 174, 179, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939).

[*779] The conduct at issue in this case falls outside the "core" of the Second Amendment, [***10] insofar as the defendant was not using the stun gun to defend herself in her home, see *Hightower*, 693 F.3d at 72 & n.8, quoting *Heller*, 554 U.S. at 627, and involves a "dangerous and unusual weapon" that was not "in common use at the time" of enactment. "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller, supra* at 626. Without further guidance from the Supreme Court on the scope of the Second Amendment, we do not extend the Second Amendment right articulated by *Heller* to cover stun guns.

Here, we are concerned not with ensuring that designated classes of people do not gain access to firearms or weapons generally, but rather with prohibiting a class of weapons entirely. The traditional prohibition against carrying dangerous and unusual weapons is not in dispute. See *Heller*, 554 U.S. at 627, citing 4 Blackstone 148-149 (1769).

The question of the dangerousness of a weapon is well fixed in the common law through the distinction drawn between weapons that are dangerous per se and those that are dangerous [***11] as used. See *Commonwealth* v. *Appleby*, 380 Mass. 296, 303, 402 N.E.2d 1051 (1980) (setting out common-law definitions of dangerous weapons). See also *Commonwealth* v. *Wynton W.*, 459 Mass. 745, 748-755, 947 N.E.2d 561 (2011) (analyzing term "dangerous weapon" in context of G. L. c. 269, § 10 [*j*], barring possession of dangerous weapons on school grounds). At common law, a weapon is dangerous per se if it is an "instrumentality designed and constructed to produce death or great bodily harm" and "for the purpose of bodily assault or defense." *Appleby, supra* at 303. Weapons of this type include "firearms, daggers, stilettos and brass knuckles" but not "pocket knives, razors, hammers, wrenches and cutting tools." *Id.* The weapons not so classified all share the same characteristic: they were

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first conducted a survey of Second Amendment jurisprudence. *District of Columbia* v. *Heller*, 554 U.S. 570, 576-628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In so doing, the Court concluded that the Second Amendment secured an individual right to bear arms for defensive purposes. *Id.* at 602. We therefore view the defendant's claim only through the lens of the Second Amendment.

designed primarily as tools and only secondarily utilized as weapons. The Court in *Heller* confirms this method of analysis in discussing *Miller*, 307 U.S. at 178. See *Heller*, 554 U.S. at 622 (*Miller* decision concerned with design or "type of weapon at issue" and not use [emphasis omitted]).

The statute at issue here explicitly prohibits "a portable device or weapon from which an electrical current, impulse, [***12] wave or [*780] beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure, or kill." G. L. c. 140, § 131J. From this statutory definition, we easily conclude that any weapon regulated by § 131J would be classified as dangerous per se at common law. The parties have stipulated that the stun gun at issue here falls within the purview of § 131J and is a weapon. Accordingly, we consider the stun gun a per se dangerous weapon at common law. The record demonstrates no evidence or argument that its purpose is for anything other than "bodily [**693] assault or defense." *Appleby*, 380 Mass. at 303.

We turn next to the question whether a weapon is unusual. Historically, when considering challenges to the ban of dangerous and unusual weapons under the Second Amendment or equivalent State statutes, courts have asked whether the weapon in question is unusual by ascertaining if it is a weapon of warfare to be used by the militia. See *Hill* v. *State*, 53 Ga. 472, 474-477 (1874); *Aymette* v. *State*, 21 Tenn. 154, 158-160 (1840); *English* v. *State*, 35 Tex. 473, 476-477 (1871); *State* v. *Workman*, 35 W. Va. 367, 372-374, 14 S.E. 9 (1891). The Supreme Court utilized this approach in *Miller*, 307 U.S. at 178, [***13] and approved its use in *Heller*. The Court said,

> "'In the colonial and revolutionary war era, [small-arms] weapons used by militia men and weapons used in defense of person and home were one and the same.' *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 ... (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6-15, 252-254 [1973]). Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[5]

Heller, 554 U.S. at 624-625. Thus, the questions whether a weapon is "unusual" and whether the weapon was "in common use at the time" of enactment are interrelated. *Id.* at 627-628.

The ban on the private possession of stun guns will not burden conduct that [***14] falls within the scope of the Second Amendment if [*781] a stun gun is a weapon not "in common use at the time" of enactment of the Second Amendment and would be dangerous per se at common law without another, primary use, i.e., as a tool. See *Heller*, 554 U.S. at 624-625, 627, quoting *Miller*, 307 U.S. at 179. For reasons that follow, there can be no doubt that a stun gun was not in common use at the time of enactment, and it is not the type of weapon that is eligible for Second Amendment protection. See *Heller*, *supra* at 622.

The record is silent as to the development of the stun gun. The record indicates only that stun guns have been available commercially for private purchase since the early 1990s. We note that the first patent for stun gun was filed in 1972. See Weapon for Immobilization and Capture, U.S. Patent No. 3,803,463

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[5] In *State* v. *Kessler*, 289 Ore. 359, 368, 614 P.2d 94 (1980), the Oregon Supreme Court described the type of weapons typically used by militiamen in defense of home *and* for purposes of the militia as being a musket or rifle, a hatchet, sword and knife or pike (a long shaft with a spear head).

(filed July 10, 1972). The recent invention of this weapon clearly postdates the period relevant to our analysis. We therefore conclude that stun guns were not in common use at the time of the Second Amendment's enactment. A stun gun also is an unusual weapon. In her motion to dismiss the complaint against her, the defendant acknowledged that the "number of Tasers [***15] and stun guns is dwarfed by the number of firearms." Moreover, although modern handguns were not in common use at the time of enactment of the Second Amendment, their basic function has not changed: many are readily adaptable to military use in the same way that their predecessors were used prior to the enactment. A stun gun, by contrast, is a thoroughly modern [**694] invention. Even were we to view stun guns through a contemporary lens for purposes of our analysis, there is nothing in the record to suggest that they are readily adaptable to use in the military. Indeed, the record indicates "they are ineffective for ... hunting or target shooting." Because the stun gun that the defendant possessed is both dangerous per se at common law and unusual, but was not in common use at the time of the enactment of the Second Amendment, we conclude that stun guns fall outside the protection of the Second Amendment. See *Heller*, 554 U.S. at 622, 627.

The question remains whether the total ban on stun guns has a rational basis. Those who challenge the constitutionality of a statute that burdens neither a suspect group nor a fundamental constitutional right bear a heavy burden in overcoming the presumption [***16] of constitutionality in favor of the statute's validity. See *English* v. *New England Med. Ctr., Inc.*, 405 Mass. 423, 427, 541 N.E.2d 329, cert. denied, 493 U.S. 1056, 110 S. Ct. 866, 107 L. Ed. 2d 949 (1989). Such is the case before us. For due process claims, the test under "the Federal Constitution is [*782] 'whether the statute bears a reasonable relation to a permissible legislative objective' ... and, under the ... State Constitution [is] whether the statute 'bears real and substantial relation to public health, safety, morals, or some other phase of the general welfare'" (citations omitted). *Id.* at 430. For equal protection claims, the test is the same under both Constitutions, namely, whether the statute is "rationally related to the furtherance of a legitimate State interest" (citations omitted). *Id.* at 428. Under the State Constitution the test also "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Id.* at 429, quoting *Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (Stevens, J., concurring). The defendant does not challenge the statute on the basis of any [***17] group classification. We therefore focus on the challenge under principles of due process.

The defendant does not articulate any basis for challenging the statute under the rational basis test. Nevertheless, we note that stun guns deliver a charge of up to 50,000 volts. They are designed to incapacitate a target by causing disabling pain, uncontrolled muscular contractions, and general disruption of the central nervous system. See Amnesty International, Less than Lethal? Use of Stun Weapons in U.S. Law Enforcement, 1-2, 6-7 & nn.17, 18 (2008), available at https://www.amnesty.org/download/Documents/52000/amr510102008en.pdf [https://perma.cc/JK53-XMR3] (last visited February 26, 2015). It is difficult to detect clear signs of use and misuse of stun guns, unlike handguns. Stun guns can deliver repeated or prolonged shocks without leaving marks. *Id.* at 1-2. The Legislature rationally could ban their use in the interest of public health, safety, or welfare. Removing from public access devices that can incapacitate, injure, or kill a person by disrupting the central nervous system with minimal detection is a classic legislative basis supporting rationality. It is immaterial that the Legislature [***18] has not banned weapons that are more lethal. Mathematical precision by the

Legislature is not constitutionally required. See *Commonwealth* v. *McQuoid*, 369 Mass. 925, 927-928, 344 N.E.2d 179 (1976). The statute easily passes the rational basis test under both the Federal and State Constitutions.

[695]** *Self-defense when homeless.* Although we already have concluded that the defendant's possession of a stun gun was in violation of a statute regulating a weapon not protected by the Second Amendment, we touch briefly on her claim that her **[*783]** homelessness at the time of her arrest should not deprive her of her right to defend herself. As noted above, the Supreme Court's holding in *Heller* stressed the particular importance of the right to defend hearth and home as the core of the Second Amendment. See *Hightower*, 693 F.3d at 72 & n.8 (noting emphasis in *Heller* on "hearth and home" and subsequent interpretations). A homeless person may indeed have a home for constitutional purposes, and this question must be determined on a case-by-case basis. For example, constitutional protections against unreasonable search and seizure can be extended to a variety of living situations. See *Commonwealth* v. *Porter P.*, 456 Mass. 254, 260-261, 923 N.E.2d 36 (2010) **[***19]** (holding reasonable expectation of privacy exists in transitional living space); *Commonwealth* v. *Paszko*, 391 Mass. 164, 184-185, 461 N.E.2d 222 (1984) (hotel room during rental period). However, where a stun gun itself is not a type of weapon the possession of which is protected under the Second Amendment, we need not decide whether a hotel room may be treated as a home under the Second Amendment. Moreover, the stun gun was found not in the defendant's hotel room but on her person in a motor vehicle, outside the "core" of the Second Amendment.

Finally, neither the legislative ban on stun guns nor our decision affects the defendant's right to bear arms under the Second Amendment. Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (*c*). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22. We hold only that the defendant's weapon of choice, the stun gun, is not protected by the Second Amendment. We acknowledge that stun guns may have value for purposes of self-defense, but because **[***20]** they are not protected by the Second Amendment and because a rational basis exists for their prohibition, the lawfulness of their possession and use is a matter for the Legislature.

Conclusion. For the reasons stated above, we hold that G. L. c. 140, § 131J, does not violate the Second Amendment right articulated in *Heller*. We affirm the defendant's conviction of possession of an electrical weapon in violation of G. L. c. 140, § 131J.

So ordered.

APPENDIX B

The Commonwealth of Massachusetts

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December 17, 2014

Francis V Kenneally
Clerk, Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

RE: Commonwealth v. Jaime Caetano
No. SJC-11718

Dear Clerk Kenneally:

The above-captioned case was argued on December 2, 2014, and is under advisement.

Pursuant to Mass. R. A. P. 16 (l), as amended, 386 Mass. 1247 (1982), I write to bring the Court's attention to State v. DeCiccio, 315 Conn. 113 (2014) (unofficially released December 16, 2014) (available at http://jud.ct.gov/external/supapp/Cases/AROcr/CR315/315CR113.pdf) (copy attached at Add. 2-Add. 48).

In DeCiccio, the Connecticut Supreme Court held that police batons and dirk knives are "Arms" within the ambit of the Second Amendment, see Add. 18-29 & nn. 23-39 at Add. 41-45, and that a Connecticut statute which criminalizes the transporting of such weapons between homes infringes the Second Amendment right of law-abiding persons, such as the defendant DeCiccio, to keep and bear arms. See Add. 29-37 & nn.40-48 at Add. 45-48.

DeCiccio is "pertinent and significant authorit[y]," Mass. R. A. P. 16 (l), for Jaime Caetano's arguments that "Stun guns are 'Arms' within the ambit of the Second Amendment" (Defendant's brief at 9-13), and that G.L. c.140, §131J is

"invalid under any standard of heightened constitutional scrutiny because it bans 'an entire class of "arms"' whose possession is protected by the Second Amendment" (Defendant's brief at 13-19).

Respectfully submitted,

Benjamin H. Keehn
Attorney for Jaime Caetano

Certificate of Service

I certify that I have this date caused to be mailed, first-class and postage pre-paid, a copy of the foregoing letter, with addendum, to ADA Michael A. Kaneb, Office of the District Attorney, Middlesex County, 15 Commonwealth Avenue, Woburn, MA 01801.

Benjamin H. Keehn
BBO #542006

APPENDIX C

Commonwealth of Massachusettss

Middlesex,ss. Framingham District Court

No. 1149-CR-2522

Commonwealth

v.

Jaime Caetano

Ruling on Motion to Dismiss

The defendant was charged with possession of an electric stun gun, and has moved to dismiss this charge on the grounds that prohibiting such possession violates the defendant's Second Amendment right to bear arms as well as Article 17 of the Massachusetts Declaration of Rights. At the outset it is recognized that the Second Amendment applies to the states (see *McDonald v City of Chicago*, 130 Supreme Court, 3020, (2010).

With some exceptions that do not apply here, G.L. c. 140, s 131J provides that "[n]o person shall possess a portable device or weapon from which an electronic current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill". On the other hand, under G. l. c. 140, s 121, a firearm is defined as "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged," but does not "include any weapon that is . . . constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette packages, . . . or not detectable as a weapon or potential weapon by X-ray machines commonly used at airports or

walk-though metal detectors."

The defendant relies heavily on Michigan's interpretation of the right to keep and bear arms' as covering weapons other than guns, noting that the Michigan law "does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense and pleasure." (Emphasis in original.) *People v. Brown*, 253 Michigan, 537, 542 (1931). By contrast, it would appear that Massachusetts characterizes items, such as stilettos, daggers, ballistic knives and blowguns as dangerous weapons possession of which is prohibited under G.l. c 269, s 10(b), as opposed to "arms" protected by the Second Amendment.

Often items possessed by law-abiding citizens for self defense are protected by the Second Amendment. However, that there may be a substantial number of stun guns "out there" does not compel a conclusion that stun guns are typically possessed by law abiding citizens. Moreover, there may well be another question of fact at a trial as to whether the particular device at issue here even fits the definition of a stun gun.[1] More importantly, in this case the defendant was not at home when she was arrested, but was passenger in a car outside a supermarket. Thus, we need not address whether a stun gun may be possessed within one's home.

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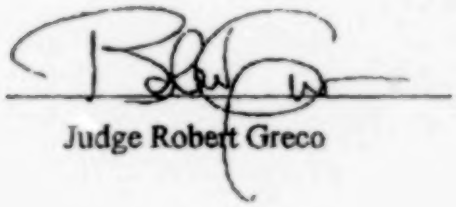
[1]Compare *Commonwealth v. Sampson*, 383 Mass.750, 754-755, fn. 6. (1981), involving different items, where the SJC noted that "[i]n contrast to signalflare devices, tear gas guns are weapons by design, in that their purpose is to subdue or incapacitate temporarily. In cases involving convictions under firearms statutes for unlawfully carrying or using tear gas guns, the issue has been not whether the instrument was a weapon, but whether it was a weapon sufficiently capable of discharging explosives or bullets so as to come within the applicable statutory or common law definition of firearm.

Based upon the above, the motion to dismiss is denied.

April 29, 2013



Judge Robert Greco

Appendix D

Massachusetts General Laws
Chapter 140, Section 131J,
as amended through St. 2004, ch. 170, §1

No person shall possess a portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill, except: (1) a federal, state or municipal law enforcement officer, or member of a special reaction team in a state prison or designated special operations or tactical team in a county correctional facility, acting in the discharge of his official duties who has completed a training course approved by the secretary of public safety in the use of such a devise or weapon designed to incapacitate temporarily; or (2) a supplier of such devices or weapons designed to incapacitate temporarily, if possession of the device or weapon is necessary to the supply or sale of the device or weapon within the scope of such sale or supply enterprise. No person shall sell or offer for sale such device or weapon, except to federal, state or municipal law enforcement agencies. A device or weapon sold under this section shall include a mechanism for tracking the number of times the device or weapon has been fired. The secretary of public safety shall adopt regulations governing who may sell or offer to sell such devices or weapons in the commonwealth and governing law enforcement training on the appropriate use of portable electrical weapons.

Whoever violates this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2 1/2 years, or by both such fine and imprisonment. A law enforcement officer may arrest without a warrant any person whom he has probable cause to believe has violated this section.

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

Supreme Court, U.S.
FILED
JUN 0 1 2015
OFFICE OF THE CLERK

COMMONWEALTH OF MASSACHUSETTS,
Respondent

V

JAIME CAETANO,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

DECLARATION OF MEMBER OF SUPREME COURT BAR REGARDING DETAILS OF MAILING UNDER RULE 29.2

I, Benjamin H. Keehn, state as follows:

1. I am a member of the Bar of the Court.

2. On June 1, 2015, I mailed a copy of the petition for writ of certiorari in the above-entitled case to Scott S. Harris, Clerk, United States Supreme Court, Supreme Court Building, One First Street N.E., Washington, D.C. 20543. The mailing was first-class postage pre-paid, and was effectuated by deposit of said petition in the United States Post Office at the Fort Point Station, 25 Dorchester Avenue, Boston, Massachusetts 02205-9761.

3. The aforementioned mailing took place on Monday, June 1, 2015, which, when computed and extended pursuant to Rule 30.1, is

90 days from March 2, 2015, the date on which the Supreme Judicial Court of Massachusetts released its opinion affirming the conviction of the petitioner sought to be reviewed, and the filing of the petition was therefore within the time permitted by Rule 13.1.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2015.

Benjamin H. Keehn
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Public Defender Division
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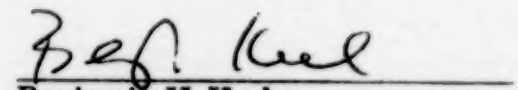
Counsel of Record for the Petitioner

CERTIFICATE OF SERVICE

I, Benjamin H. Keehn, counsel for the petitioner in this case, hereby certify that on this 1st day of June, 2015, in compliance with Rule 29.3 of this Court, I served a copy of the foregoing "Declaration of Member of Supreme Court Bar Regarding Details of Mailing Under Rule 29.2" upon all parties required to be served, by mailing the same, with first-class postage prepaid, and by transmitting by electronic mail the same, to the offices of the following:

Randall E. Ravitz
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, MA 02108
randall.ravitz@state.ma.us



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Counsel of Record for the Petitioner

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CERTIFICATE OF SERVICE

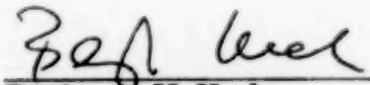
I declare that on this date, June 1, 2015, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari on counsel for each party to the above proceeding, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them, with first-class postage prepaid, and by electronic mail.

The names and addresses of those served are as follows:

Randall E. Ravitz
Assistant Attorney General
Chief, Criminal Appeals Division
One Ashburton Place
Boston, MA 02108
randall.ravitz@state.ma.us

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 1, 2015.



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